UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JOHN S. NORTON, SR.,	)	
	)	
Plaintiff	)	
	)	
v.	)	Civil No. 88-0147 P
	)	
CITY OF PORTLAND,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON CROSS MOTIONS FOR SUMMARY JUDGMENT

The plaintiff, owner of a parcel of land on Long Island, in the City of Portland, Maine ("City"), has brought this action under 42 U.S.C. ' 1983 seeking damages and injunctive relief from the City for, inter alia, deprivation of his Fourteenth Amendment rights "to peacefully hold and enjoy property" and to equal protection. Complaint 9. The plaintiff's land is crossed by two roads known as Island Avenue and Marginal Street. The plaintiff claims that these roads are not public ways and that the City "knew or should have known" that the public has no right to use these roads for any purpose. Complaint 6-7. Nevertheless, according to the plaintiff, the City has used Island Avenue for parking and has caused and encouraged the public to do so as well.[1] Deposition of John S.

[1]The complaint alleges, in part, that the City:

(1) Has used Island Avenue and Marginal Street as a public way for purposes of travel and parking and for other purposes;

(2) Has caused and encouraged residents and visitors of Long Island to use same as public ways for purposes of travel and parking and other purposes.

Norton, Sr. pp. 18-19, 22-26, 162-67. The plaintiff states that sometime in 1986 the City expressly or impliedly told residents and visitors that Island Avenue is a public way. Deposition of John S. Norton, Sr. p. 169. In addition, the plaintiff alleges that the City has instructed its police officers and its other officials not to enforce laws prohibiting trespass and unauthorized parking against people who parked on Island Avenue. Id. pp. 167-69; Complaint 8.3.

The plaintiff seeks one million dollars in damages suffered from 1986 to the present as a result of the parking problem caused by the City. Deposition pp. 170-71; see also Complaint 10. This request for damages is based on the lack of use and enjoyment of his property and on physical, mental and emotional pain and suffering because of his worry about the property and because his wife will not travel with him to the Island. Deposition of John S. Norton, Sr. pp. 170-71; 174-79. In addition to damages, the plaintiff seeks injunctive relief commanding the City to acknowledge publicly that Island Avenue is not a public way and to take all steps necessary or proper to prevent future unauthorized use, including the enforcement of criminal trespass laws. Complaint pp. 3-4. Before the court are the defendant's motion for summary judgment and the plaintiff's motion for partial summary judgment.

Property Claims

Complaint 8.1, 8.2. However, in his deposition the plaintiff conceded that his claim is limited to Island Avenue and does not concern Marginal Street, and that it relates only to parking, not travel or other uses of the road. Deposition of John S. Norton, Sr. pp. 30-31, 162-70.

The plaintiff's complaint states in part that the City has deprived him of "his rights and privileges secured by the Constitution and laws of the United States within the meaning of 42 U.S.C.A. Sec. 1983 including, but without limitation, the right to peacefully hold and enjoy property as guaranteed by the Fourteenth Amendment to the United States Constitution." Complaint 9. The precise nature of the property rights violation claimed by the plaintiff is not easily discerned from his complaint since the Fourteenth Amendment encompasses several different property rights.[2] The Fourteenth Amendment's due process clause includes the right to procedural as well as substantive due process. In addition, the takings clause of the Fifth Amendment applies to the states through the Fourteenth Amendment.[3] See Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239-41 (1897).

[2]The Fourteenth Amendment provides, in relevant part, "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, ' 1.

[3]The takings clause provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

The City, in its first memorandum in support of its motion for summary judgment, treated the complaint as alleging a takings clause violation. The plaintiff responded that his property claim concerns due process, not a taking.[4] Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment. The plaintiff argues that his claim is not that his property has been taken but that he has been deprived of the exclusive use and enjoyment of it without due process. He asserts that the City decided the question of public rights in and to Island Avenue without affording him the adequate procedural protections which are his due, because he had no notice of the City's decision concerning public rights to Island Avenue and had no opportunity to respond to that decision. Plaintiff's Rebuttal Memorandum in Opposition to Defendant's Motion for Summary Judgment.

However, no fair reading of the complaint discloses that the plaintiff is asserting a procedural due process claim. Although a complaint must be construed liberally, see Conley v. Gibson, 355 U.S. 41, 48 (1957), it must at least give the defendant fair notice of the nature of the claim, see Mann v. Adams Realty Co., 556 F.2d 288, 293 (5th Cir. 1977). This complaint makes no specific mention of any procedural due process claim. Although it refers to Fourteenth Amendment property rights, that

[4]If the plaintiff had asserted a takings claim, the City would be entitled to summary judgment on this issue. A claim for compensation for a taking may not be brought under 42 U.S.C. ' 1983 until the plaintiff has sought compensation through available state procedures. Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194-95 (1985); Ochoa Realty Corp. v. Faria, 815 F.2d 812, 816-17 (1st Cir. 1987). The United States Supreme Court reasoned that the takings clause "does not proscribe the taking of property; it proscribes taking without just compensation." Williamson, 473 U.S. at 194. Therefore, "no constitutional violation occurs until just compensation has been denied." Id. at 194 n.13. Applying Williamson, this court has held that Maine law provides an adequate takings remedy which must be pursued before a federal takings claim may be maintained. Lerman v. City of Portland, 675 F. Supp. 11, 15-16 (D. Me. 1987). There is no evidence that the plaintiff has pursued such a state remedy in this case.

reference is not sufficient, without more, to state a procedural due process claim. See Paschal v. Florida Employment Relations Commission, 666 F.2d 1381, 1383-84 (11th Cir.), cert. denied 457 U.S. 1109 (1982). The complaint makes no mention of procedure; it contains no allegations about the procedural protections that the plaintiff claims were due him or that any available procedural protections failed to protect his interest. See Angleton v. Pierce, 574 F. Supp. 719, 732-33 (D.N.J. 1983), aff'd, 734 F.2d 3 (3d. Cir), cert. denied, 469 U.S. 880 (1984). Moreover, the relief requested does not include any procedural protections.

The plaintiff has not sought leave to amend his complaint, but he does discuss the procedural due process theory in his two memoranda opposing the defendant's summary judgment motion. In similar situations, some courts have treated the assertion of a new theory not adequately stated in the complaint as a motion to amend the complaint. See, e.g., Sola v. Lafayette College, 804 F.2d 40, 45 (3d Cir. 1986); Tefft v. Seward, 689 F.2d 637, 638-39 (6th Cir. 1982); Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972). However, the First Circuit Court of Appeals has held that a plaintiff who has not adequately stated a particular claim in the complaint does not have "license to amend the complaint by memorandum in the district court." Daury v. Smith, 842 F.2d 9, 15 (1st Cir. 1988). Therefore, because the complaint does not adequately allege a procedural due process claim and the plaintiff has not sought leave to amend, I conclude that the plaintiff has not stated a valid procedural due process claim.

Even if the complaint stated a procedural due process claim, such a claim could succeed only in the absence of state procedural remedies adequate to redress the plaintiff's alleged property rights deprivation. See Decker v. Hillsborough County Attorney's Office, 845 F.2d 17, 21-22 (1st Cir. 1988); Lamoureux v. Haight, 648 F. Supp. 1169, 1174-75 (D. Mass. 1986). The Supreme Court in

Parratt v. Taylor, 451 U.S. 527 (1981), held that where random and unauthorized actions by state officials result in deprivations of property interests, pre-deprivation procedures are impractical; in such cases, due process simply requires that adequate state post-deprivation remedies be available. See also Hudson v. Palmer, 468 U.S. 517 (1984) (extending Parratt to cases of intentional unauthorized deprivation of property rights).[5]

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[5]The Supreme Court has distinguished Parratt from cases where an established government procedure, rather than unauthorized action, causes the deprivation of property; in these cases, pre-deprivation procedures are likely to be appropriate, and a federal due process claim can be brought despite the existence of post-deprivation state remedies. Logan v. Zimmerman Brush Co., 455 U.S. 422, 435-37 (1982). The plaintiff in this case has not alleged that any established government procedure caused him to be deprived of his property without due process.

The plaintiff argues that there is no requirement to exhaust state law remedies before bringing a ' 1983 due process claim. See Patsy v. Florida Bd. of Regents, 457 U.S. 496 (1982); Monroe v. Pape, 365 U.S. 167, 183 (1961). The Supreme Court has explained, however, that this rule refers only to procedures for reviewing adverse final decisions. Williamson, 473 U.S. at 192-94. This rule does not conflict with the requirement that available state remedies must first be pursued in takings cases under Williamson and in procedural due process cases under Parratt because no final taking without just compensation and no final deprivation of property without due process can occur until available state procedures are utilized. Id. at 194 n.13.

Daniels v. Williams, 474 U.S. 327 (1986), overruled that portion of Parratt which holds that a state official's negligent action resulting in the unintended loss of property or injury could implicate the due process clause under ' 1983. However, the Parratt analysis of available state remedies to redress a loss is unaffected by Daniels.

In this case, the plaintiff argues that as a result of the unauthorized actions of the City's corporation counsel and manager, the public has been encouraged and permitted to use that part of Island Avenue which crosses his property for parking, thus depriving him of an interest in his property. See Deposition of John S. Norton, Sr. pp. 18-19. The plaintiff, however, did not pursue available post-deprivation state remedies. He could have brought a quiet title action pursuant to 14 M.R.S.A. '' 6651 et seq., he could have sought a declaratory judgment pursuant to 14 M.R.S.A. '' 5951 et seq. and injunctive relief or he could have sought compensation under an inverse condemnation theory, see Ricker v. Wells Sanitary District, CV-84-81 (Me. Super. Ct., York County, August 29, 1985) (defense of sovereign immunity not applicable to inverse condemnation claim); Foss v. Maine Turnpike Authority, 309 A.2d 339, 344 (Me. 1973).[6] Accordingly, a procedural due process claim would not lie in any event even had one been adequately stated in the complaint.

[6]Although sovereign immunity may preclude the plaintiff from asserting state tort claims against the City to recover any damages he may have suffered as a consequence of any deprivation of his property interests, any such damages could have been minimized, if not avoided altogether, had he pursued available state law remedies to clarify and enforce his rights when the parking first began to be a problem in July 1986.

Read liberally, the complaint can be construed to assert a substantive due process claim based on a violation of the plaintiff's due process rights. A substantive due process claim is "'not a claim of procedural deficiency, but, rather, a claim that the state's conduct is inherently impermissible.'" Lamoureux, 648 F. Supp. at 1175, quoting Schiller v. Strangis, 540 F. Supp. 605, 614 (D. Mass. 1982). See also Rochin v. California, 342 U.S. 165, 172-73 (1952) (evidence obtained by pumping stomach of criminal suspect held inadmissible under due process clause, which prohibits substantive conduct that 'shocks the conscience'). In some circumstances, substantive due process claims have been based solely on violations of the due process clause on the theory that government "decision makers may not act in a manner which is 'wholly arbitrary or irrational.'" Black v. Sullivan, 561 F. Supp. 1050, 1061 (D. Me. 1983), quoting Martinez v. California, 444 U.S. 277, 282 (1980). See also Hartman v. City of Providence, 636 F. Supp. 1395, 1418 (D.R.I. 1986) (city employee brought substantive due process claim challenging as arbitrary city's decision to eliminate her position). But see Lamoureux, 648 F. Supp. at 1176 n.1 ("This court believes that a substantive due process claim may not rest solely on an alleged egregious deprivation of procedural due process."). It is clear that substantive due process claims can be based on violations of substantive constitutional rights other than the right to procedural due process, and that for such claims, in contrast to procedural due process or takings claims, adequate state procedural remedies need not be pursued. See Lamoureux, 648 F. Supp. at 1175. The law is less settled regarding substantive due process claims based solely on violations of procedural due process.[7]

[7]The First Circuit has held that even where a municipality causes a deprivation of property by actions that are arbitrary and in bad faith, the conventional planning dispute does not rise to the level of a substantive due process claim absent flouting of state judicial authority, racial animus, First Amendment violations or similar infringements of fundamental rights. See Raskiewicz v. Town of

New Boston, 754 F.2d 38, 44 (1st Cir.), cert. denied, 474 U.S. 845 (1985); Roy v. City of Augusta, 712 F.2d 1517, 1524 (1st Cir. 1983); Chiplin Enters., Inc. v. City of Lebanon, 712 F.2d 1524, 1527 (1st Cir. 1983); Creative Env'ts, Inc. v. Estabrook, 680 F.2d 822, 831-34 (1st Cir.), cert. denied, 459 U.S. 989 (1982). The First Circuit reasoned that where state remedies are adequate to correct legal errors of local administrative bodies, due process is not violated. Creative Env'ts, Inc., 680 F.2d at 832 n.9, 833-34, citing Parratt v. Taylor, 451 U.S. at 542.

In these cases, the First Circuit was concerned that federal courts would end up sitting as super zoning boards of appeals if federal due process was implicated every time a town official withholds a permit in violation of state law. See Creative Env'ts, Inc., 680 F.2d at 833. See also Public Service Co. v. Town of W. Newbury, 835 F.2d 380, 385 (1st Cir. 1987) (no due process claim where town threatened to remove emergency warning siren poles for which unauthorized and invalid permits had been issued by board of selectmen); Friends of Children, Inc. v. Matava, 766 F.2d 35, 36 (1st Cir. 1985) (rejecting substantive due process claim by adoption agency for arbitrary, unauthorized action by state employee "where no unusual harm is claimed and where state remedial processes are adequate.").

Other circuits have generally rejected the First Circuit's approach to substantive due process claims under ' 1983 in land use permit cases. See Littlefield v. City of Afton, 785 F.2d 596, 604-09 (8th Cir. 1986) (collecting cases).

In this case, the plaintiff argues that the City's decision to claim a public right to park on Island Avenue as it crosses his property was arbitrary and irrational. The complaint states that the City "knew or should have known that Island Avenue . . . [was] not [a] public way[ ] and that the public had no right to use same for any purpose," but that the City nevertheless treated Island Avenue as a public way. Complaint 7, 8. Although the plaintiff in his memoranda simply uses the term "due process," without distinguishing substantive from procedural claims, he argues that "the City did not care whether its decision was right or wrong, and it completely ignored evidence known to exist and known to be important which undoubtedly would have been presented had a hearing been held," Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment p. 6, and that "the City simply concocted the notion of public rights in the roadway to lend an aura of reasonableness to its conduct and to enable it to solve its parking problem on Long Island free of charge," id. p. 9.

However, where there has been no denial of procedural due process, it follows that there has been no denial of substantive due process which is based on the deprivation of procedural due process. Lamoureux, 648 F. Supp. at 1176 & n.1 (no denial of procedural or substantive due process where unauthorized actions by town selectmen and chief of police deprived plaintiff of disability benefits but where plaintiff had not pursued available state remedies). Here, as discussed above, even if the complaint had stated a procedural due process claim, this claim would have failed because the plaintiff had adequate state remedies available to him. Therefore, even assuming the City officials in this case acted arbitrarily and in bad faith to deprive the plaintiff of his property rights, no substantive due process violation exists.

Equal Protection Claim

Government action which results in unequal treatment is valid if it is rationally related to a legitimate government interest, except where the unequal treatment involves a fundamental right or is based on a suspect classification such as race, alienage, national origin or gender. See City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440-41 (1985); Maine Central R.R. Co. v. B.M.W.E., 813 F.2d 484, 488 (1st Cir. 1987), cert. denied, 108 S. Ct. 91 (1988). The plaintiff does not contend that any suspect classification or fundamental right is involved in this case. Instead, his argument is that the City has refused to enforce trespass laws for his benefit, and that the reason for this refusal is simply the City's "desire to solve its parking problems at Mr. Norton's expense." Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment p. 12.

The City argues that its motion for summary judgment on the equal protection claim should be granted regardless of the actual reasons for the City's decision to treat Island Avenue as a public way. According to the City, the decision is valid as long as it is conceivably or arguably rationally related to a legitimate government interest. See Jackson Water Works, Inc. v. Public Utilities Commission, 793 F.2d 1090, 1093-94 (9th Cir. 1986), cert. denied, 479 U.S. 1102 (1987); Dimond v. District of Columbia, 792 F.2d 179, 186 (D.C. Cir. 1986). Although sometimes courts have reviewed the actual reasonableness of unequal treatment by the government under this rationality test, the majority view is to ask only whether the unequal treatment is conceivably rational. R. Rotunda, J. Nowak & J. Young, Treatise on Constitutional Law: Substance & Procedure ' 18.3 at 324, 330-35, 341-43; L. Tribe, American Constitutional Law, ' 16-3 at 1443-46.

The unequal treatment at issue in this case is that the City has singled out the plaintiff because it has disregarded his property rights by informing the public that Island Avenue as it crosses his property is a public way and by instructing the police not to enforce trespass laws against people parking on that portion of Island Avenue. See Deposition of John S. Norton, Sr. p. 179. The City argues that it is at least conceivable that the city manager believed the corporation counsel's legal opinion that there was a public easement by implication over Island Avenue; therefore, it is at least possible that a rational basis existed for the City's decision to treat the plaintiff's property differently from other private property. The plaintiff controverts the defendant's statement that the City's corporation counsel gave the city manager a legal opinion that a public easement by implication may exist. Plaintiff's Statement of Controverted Facts 7. The plaintiff argues that the corporation counsel first gave an opinion in 1980 saying he had seen no evidence of any public rights to Island Avenue, Exhibit 1C to Deposition of David A. Lourie, but that he changed this opinion without any rational basis. While it is true that the City's corporation counsel did express an opinion in a letter to the plaintiff's counsel in October, 1980 which is supportive of the plaintiff's title position, a thorough review of the entire record reveals no dispute concerning the fact that the corporation counsel did give the city manager a written opinion dated November 19, 1982 that the City has a right-of-way over the disputed portion of Island Avenue based on an easement by prescription. Exhibits 1C and 4 to Deposition of David A. Lourie. Moreover, the plaintiff has not controverted the defendant's assertion that, either before or after the city manager received the corporation counsel's written opinion, the two met and discussed the written opinion and that the city manager then made a decision about how to handle the dispute concerning Island Avenue.[8] See Deposition of David A.

[8]The plaintiff testified at deposition that his dispute with the City concerning the use of the road

Lourie pp. 36-37; 52-59; Exhibit 4 to Deposition of David A. Lourie. Although the plaintiff may be correct that the corporation counsel's theory of a public easement had no possible rational basis, it is still conceivable that the city manager could rationally have relied on this legal opinion in his decision to treat all of Island Avenue as a public way. I conclude that it is arguable that the City had a rational basis for its treatment of the plaintiff; because the actual reasons for the City's actions are not material, the defendant is entitled to summary judgment on the plaintiff's equal protection claim.

For the foregoing reasons, I recommend that the defendant's motion for summary judgment be GRANTED.[9] If the defendant's motion is granted, the plaintiff's motion for partial summary judgment on the issue of the City's defense of immunity and on the issue of the right of the public or the City to park on the portion of Island Avenue that crosses the plaintiff's land will become moot.

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has existed since 1986, well after the City's corporation counsel informed the city manager that the public may have rights to the disputed section of Island Avenue. See Deposition of John S. Norton, Sr. p. 28.

The defendant has also submitted the affidavit of Stephen T. Honey, formerly the city manager. The plaintiff has moved to strike it as not in compliance with Fed. R. Civ. P. 56(e). The affidavit is based on the affiant's personal knowledge and upon information and belief with no specification as to which statements of fact are made on which basis. Rule 56(e) requires, inter alia, that affidavits supporting and opposing summary judgment motions be made on personal knowledge. I treat Honey's undifferentiated affidavit as not satisfying this requirement of the Rule and, accordingly, have not considered it.

The plaintiff has also moved to strike the affidavit of David A. Lourie. I find that this affidavit satisfies the requirements of Rule 56(e), except for paragraphs 8 and 10 which are specifically made on information and belief and which the defendant concedes may be stricken.

[9]The defendant's summary judgment motion states that it is based on "the absence of a federal question." In this case, however, the complaint adequately demonstrates a controversy arising under the Constitution or laws of the United States. The problem is not that the court lacks subject matter jurisdiction, but that the plaintiff has failed to adequately state a claim on which the court can grant relief. See Ortiz de Arroyo v. Barcelo, 765 F.2d 275, 279-81 (1st Cir. 1985); Chiplin Enters., Inc., 712 F.2d at 1528-29.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

DATED at Portland, Maine, this 29th day of March, 1989.

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David M. Cohen
United States Magistrate